

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (DB) No. 351 of 1991**

Arising out of PS.Case No.6 Year- 1979 Thana-Daudnagar District--Aurangabad

1. Ram Govind Dubey, Son of Markandey Dubey.  
2. Ram Peyare Dubey, Son of Ram Govind Dubey.  
Both residents of village Khaira Dubey, P.S. Daud Nagar, District Aurangabad.  
.... Appellants

Versus

The State of Bihar

.... Respondent

With

**Criminal Appeal (DB) No. 360 of 1991**

Arising out of PS.Case No.6 Year- 1979 Thana-Daudnagar District--Aurangabad

1. Ram Niwas Dubey, Son of Bacchu Dubey.  
2. Siddhi Dubey, Son of Chandeshwari Dubey.  
3. Kameshwar Dubey, Son of Ramchandra Dubey.  
All residents of village Khaira Dubey, P.S. Daud Nagar, District Aurangabad.  
.... Appellants

Versus

The State of Bihar

.... Respondent

With

**Criminal Appeal (DB) No. 375 of 1991**

Arising out of PS.Case No.6 Year- 1979 Thana-Daudnagar District--Aurangabad

Devendra Dubey, Son of Ram Kumar Dubey, resident of village Khaira Dubey  
(Khairadip), P.S. Daudnagar, District Aurangabad.  
.... Appellant

Versus

The State of Bihar.

.... Respondent

**Appearance :**

**(In CR. APP (DB) No. 351 of 1991)**

**(In CR. APP (DB) No. 360 of 1991)**

**(In CR. APP (DB) No. 375 of 1991)**

For the Appellants : Shri B.P.Pandey, Sr. Advocate  
: Shri Pramod Kumar, Advocate  
For the State : Dr. Mayanand Jha, APP  
For the State : Shri Dilip Kumar, Sinha, APP

**CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA**


**and**

**HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL**

**ORAL JUDGMENT**

**(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)**


**Date: 20-11-2014**



The batch of three appeals arises out of judgment of conviction dated 4.9.1991 and order of sentence passed on 5.9.1991 by the learned 3rd Additional Sessions Judge, Aurangabad in Sessions Trial No. 169 of 1980/ 46 of 1991 by which all the appellants except Devendra Dubey had been convicted under Sections 148 and 302 of the Indian Penal Code and each of them was directed to suffer rigorous imprisonment for two years and for life under the two respective counts of his conviction. As regards solitary appellant Devendra Dubey of Cr. Appeal (D.B.) No. 375 of 1991 he was convicted of offence under Sections 148 and 302 of the Indian Penal Code as also under Section 27 of the Arms Act and was directed to suffer the same terms of imprisonment as his other companion convicts were to suffer on account of having been found guilty of offence under Sections 148 and 302 of the Indian Penal Code and had further been directed to suffer rigorous imprisonment for two years for committing the offence under Section 27 of the Arms Act. Out of the nine convicts, appellant no. 1 Ram Sakal Dubey and appellant no. 4 Saligram Dubey of Criminal Appeal (D.B.) No. 351 of 1991 as also appellant no. 4 Rameshwar Dubey @ Ramesh Dubey of Cr. Appeal (D.B.) No. 360 of 1991 died during the pendency of these appeals and their appeals abated due to their deaths.

2. It may also be pertinent to point out that originally there were only 11 accused persons named in the First Information Report but 13 accused persons were put on trial on account of having been implicated during the investigation by the witnesses out of whom four, namely, Hirdeya Dubey, Siyaram Dubey, Sri Ram Dubey and Ramashish Ojha were acquitted of the charges they had been indicted of. We have heard these appeals together and we are disposing them of by this common judgment.

3. Radha Singh Yadav (P.W.5) who happened to be the son of deceased Ramautar Yadav came to the police station along with the dead body of his father with others, like, Chandra Deo Singh (P.W. 4), Shiv Bachan Singh (P.W. 1), Kedar Singh (P.W. 2) Dhanrajik Yadav (P.W. 3) and got his statement recorded by the Officer-in-Charge of Daudnagar Police Station on 7.12.1979 at about 6.30 p.m.. He alleged that on that particular day at about 3 p.m. he along with his deceased father Ramautar Yadav were bringing the bundles of paddy from their fields into the *khalihan*. They had brought the bundles together and were about to leave the *khalihan* for going to the field for fetching the bundles again when 11 accused persons named in the First Information Report arrived there. Appellant Devendra Dubey was carrying a rifle with him, whereas, appellants Ram Niwas Dubey, Ram Sakal Dubey,



Kameshwar Dubey, Shaligram Dubey and Hirdeya Dubey (since acquitted) were carrying guns. Appellant Ram Niwas Dubey was carrying a country made pistol. Appellants Sidhi Dubey, Rameshwar Dubey, Ram Govind Dubey were armed with *bhalas*, whereas, Ram Pyare Dubey was carrying a *farsa*. No sooner the accused persons had arrived at the *khalihan* of the informant, than appellant Devendra Dubey fired a shot which hit the father of the informant, namely, Ramautar Yadav just by the umbilicus on its left side, as a result of which he fell down dead. Ramniwas Dubey also fired a shot, but that does not appear targeted upon the informant and others and, as such, that does not even appear to have caused a scratch to any of them. The informant stated that in order to save themselves the witnesses had hidden themselves behind the bundles of paddy.

4. Finding that Ramautar Yadav was dead, the accused persons ran away from there with their respective weapons. The informant stated that he and his companions dared not chasing them out of fear.

5. The reason for the occurrence as alleged by the informant was pendency of two criminal cases between him on the one side and accused persons on the other which included a proceedings under Section 107 Cr.P.C. which was still going on on the date of occurrence in some court.

6. The Investigating Officer had not been examined and, as such, we do not have any inkling as to how the investigation had progressed, but what appears from the record is that the dead body was sent for autopsy to Aurangabad Hospital where P.W. 6 Dr. S. J. Rahman had held autopsy on it and had found the solitary ante-mortem injury on the dead body which was as below:-

(i) in the middle quadrant of the left side of the abdomen, there was one oval lacerated wound just above the iliac crest 1" in diameter. There was a little amount of blackening around the aperture and peritoneum had popped out of the aperture created by the wound. A corresponding lacerated wound was found on the back on its left side measuring 1¼" in diameter.

On opening the abdomen P.W.6 did not find any pellet. He found the intestine ruptured at many places and in his opinion the pellet might have passed out of the corresponding aperture on the back that's, the wound of exit. P.W. 6 further opined that the above injuries had been caused by firearm, like, a rifle fired from a distance of more than four feet. In the opinion of P.W. 6 the time elapsed since death and holding of post-mortem examination was about 12 to 18 hours. Thus, the fact that Ramautar Yadav had been shot and killed is concluded from the evidence of PW6. It appears that after closing the investigation the Investigating Officer

sent up the 13 persons for trial by submitting the charge-sheet which ended in the impugned judgment.


7. The defence of the appellants was of false implication and non-participation in the commission of the offence. Appellant, like, Ram Sakal Dubey had taken a plea of alibi by pleading that on the date of occurrence he was admitted in Sadar Hospital, Aurangabad and had been discharged subsequent to the occurrence. The defence of being falsely implicated due to enmity was also there.

8. Six prosecution witnesses were examined in support of the charges including PW6 Dr. S. J. Rahman as noted earlier. Out of the remaining five witnesses, P.W. 4 Chandra Deo Singh had been tendered for cross-examination thus, the support to the charges were limited to the evidence of four witnesses, i.e., P.Ws. 1, 2, 3 and 5 who all gave eye witness account of the occurrence. The defence examined two witnesses as we have just noticed. P.W. 1 was tendering in evidence the discharge slip of appellant Ram Sakal Dubey so as to establishing that the above named appellant had been admitted in Sadar Hospital, Aurangabad prior to the day of occurrence, whereas D. W. 2 had brought on record a copy of first information report which was marked Ext. C.

9. The witnesses examined by the prosecution were

held trustworthy by the learned trial Judge who also held that their testimony was substantially corroborated by the evidence of P.W. 6 Dr. S. J. Rahman and ultimately, held that the charges had been brought home against the appellants while the same had not been proved against four accused persons who were acquitted.


10. Shri B. P. Pandey, the learned senior counsel has appeared for the appellants in the three appeals. We were taken through the evidence of the witnesses and while so doing Shri Pandey criticized individual evidence of the witnesses by drawing the attention of the Court to some of the significant aspects of their individual evidences. It was contended that there is no doubt that Ramautar Yadav was killed but it was very curious that his wife who was in his house which was situated somewhere at a distance of about 100 yards, had neither been informed nor she out of her own would come to have a glance of her husband who had been killed. Yet another curious behaviour as per Sri Pandey was that of the informant (P.W. 5), who saw his father being shot and killed but did not rush to his village or to his house for informing the people or his family members. Submission also was that admittedly, as may appear from P.W. 2 Kedar Singh, the full brother of the deceased it was a harvesting time and people were harvesting the paddy crop all around the place of occurrence, but even after the firing of the shots



and the running away of the accused persons no one was rushing to the scene of occurrence to find out as to who had been killed by whom. By citing a Supreme Court decision reported in (2013) 6 SCC 417, *Lahu Kamlakar Patil & Anr. vs. State of Maharashtra*, it was submitted that the unusual human behaviour of the persons and the witnesses as also the family members probably was indicating to a different story which was suppressed by the prosecution and that was missed by the learned trial judge who wrongly convicted the present set of appellants. It was also contended that the appellants were convicted by virtue of Section 149 of the Indian Penal Code but except the solitary statement in the First Information Report that accused Ram Niwas Dubey, Ram Sakal Dubey and Kameshwar Dubey had also fired upon the informant and others, there was no evidence to support that particular allegation and it does not appear established that indeed accused persons had acted in prosecution of the common object by ultimately killing Ramautar Yadav.


11. Dr. Mayanand Jha, the learned Additional Public Prosecutor has appeared on behalf of the State and he was submitting that human conduct may not have some set pattern and every human being reacts or acts in his own special manner under situation of threat and despair. However, Dr. Jha was fairly submitting that the evidence of witnesses does not indicate that any





accused other than Devendra Dubey had committed any overt act rather it is indicated by the evidence available on record that they did not even raise their voice or their hands showing that they had indeed appeared there in prosecution of the common object and that they knew that the murder of Ramautar Yadav was likely to be committed by one of them.


12. While being taken through the evidence of witnesses, we did find that no one had rushed or appeared at the place of occurrence even after the accused persons had run away from there. The evidence of P.W. 5 Radha Singh Yadav, the informant of the case also indicated that he also did not move out the place even to go to his house to inform his family members as to what had happened and who had killed his father. But that appears unexplainable on the very evidence of witnesses who were very categorically speaking that as soon as the accused persons came there armed variously, Devendra Dubey fired the shot and they chose to save themselves by taking shelter behind the bundles of paddy. A single shot was fired by Devendra Dubey which appears from the evidence of all the witnesses and that hit the deceased and he fell dead. P.W. 2 Kedar Singh and other witnesses had also admitted that it was the paddy harvest season and harvesting was going on all around the place of occurrence, but no one rushed or



came to the scene of occurrence even after the accused persons had run away from there. One may in some different situation treat the circumstance as not befitting to the usual human behaviour as usually, an incident of the magnitude which had occurred on 7.12.1979 generally attracts a huge mob after the occurrence is over. But the Supreme Court decision which was cited by Shri Pandey appears taking into account the submission which was raised before their lordships also and after perusing some of the decisions of the Apex Court in paragraphs 23, 24 and 25 of the judgment appears observing in paragraph 26 as follows:-


*"From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded.*

13. The Supreme Court had also taken note of the submission which was raised before us on the unusual conduct of persons and as appears from the above paragraph, held that reacting to a particular situation differs from individual to individual and




further there cannot be any uniform human reaction. One of the most usual behaviour which had appeared in recent time in rural areas or urban part of the nation is that most of us do not want to be concerned with incident where one has to stand up into the witness box to depose against a person. If it is a criminal case then this behaviour is more prominently observed even in literate persons and one of chief reasons of such a behaviour is that the grilling one gets while being examined as witness during trial proceedings is so discouraging and insulting sometimes, that most of us want to keep ourselves aloof of being a witness.

As appears from the evidence, it was a case of single shot and no sooner Devendra Dubey had appeared there, he had fired the shot without even having an exchange of words either with the deceased or with anyone of his family as appears from the evidence. Witnesses were the family members of Ramautar Yadav and they have stated that they did not have any individual animosity with any of the accused persons. They could have chosen to come into the witness box, but those who were away and not present there and those who had seen the occurrence happening from a distance on account of being engaged in harvesting the paddy crop might have thought it better to keep themselves away from the affairs of the witnesses and their family members and not to poke their noses



individually in such serious matter. Considerations could have been various for them. They might have thought it not to rub their skin against a person, like, Devendra Dubey who was not hesitating in firing a shot without even having some exchange of words or without any provocation given by anyone to him. Life is very precious to everyone and probably they were purchasing safety by keeping themselves away from the affairs of the informant and his family even if his father had been brutally killed. For these reasons we do not find it a sufficient circumstance if the persons other than witnesses had not rushed to the place of occurrence to discard the prosecution case.


14. So far as the non-appearance of the wife of the deceased is concerned, Sri Pandey was drawing our attention towards paragraph-27 of the above noted judgment in which the conduct of witness in not having gone to the village or to the house of the deceased to inform anyone about the incident and going away to Pune instead has been noted. He had not even informed his wife or his family members about the incident and the Supreme Court had taken note of this unusual conduct of P.W.2 of *Lahu Kamlakar Patil* (supra) to discard his evidence. Here in the present case, P.W.5 the informant of the case was the son of the deceased and he had very categorically stated that he did not even go to his house to inform




anybody or the villagers in that regard. But what we find from the perusal of the evidence of the four witnesses is that they had immediately arranged for a cot, put some bedding material, like, carpet etc. and after putting the deceased on to it had rushed to the police station for lodging the report. Sri Pandey was critical of this behaviour also on another score when it was pointed out that they should have instead taken the dead body of the deceased to their house to show the dead body to the family members specially the mother of the informant. We do appreciate the argument that it could have been one of the finest behaviour and expected action as regards a son, like, P.W.5 or brother like P.W.2 or other family members, like, P.Ws. 1 and 3 who were very closely related to the deceased as appears from the evidence of P.W.1 in paragraph-4. But, it could be those persons who could have explained the conduct of not either informing their family members or taking the dead body for their perusal. During the cross-examination of witnesses which was quite lengthy and witnesses were even recalled after amendment of charges, we could not find a single isolated line in an attempt to elicit an explanation from those witnesses on that particular point which was raised by Sri Pandey as to why they chose not to take the dead body to their house or did not inform their family members either. The witnesses, in our opinion, could have

been more concerned about lodging a report promptly as the man was already dead and they had due to that concern rushed to the police station with the dead body to lodge the report as they did through P.W.5.

15. The third contention which was raised by Sri Pandey was the non-proof of motive. The First Information Report recited that there were two criminal cases pending between the parties and one of the cases was a proceedings under Section 107 Cr.P.C. Witnesses other than P.W.5 had admitted that they did not have any individual animosity with the accused persons; even the full brother of the deceased Kedar Singh (P.W.2) stated in paragraph-3 as also in paragraph-8 of his deposition that he did not have any quarrel with the accused. He did not even have any inkling that they had some ill-will towards him and that the accused persons did not have any concern with the *Khalihan* least to talk of some dispute with the deceased and others in that aspect. This is somewhat other witnesses have also stated except P.W.5, who stated that he himself had initiated a proceedings under Section 107 Cr.P.C. against Devendra Dubey and others by filing a petition before the S.D.M., Aurangabad. This evidence appears in paragraph-3 of P.W.5 as also in paragraph-4 when P.W.5 was cross-examined to the above fact of initiating a proceedings under Section



107 Cr.P.C. against Devendra Dubey and others. It was initiated against P.W.5 and his father both of whom were one of the parties to the proceedings and that was initiated by appellant Kameshwar Dubey on a petition filed for that purpose. It is true that P.W.5 had admitted that there was no other case pending on the day of occurrence or prior to that or there had been any other case prior to that between the accused persons and the deceased. It is true that the First Information Report recites pendency of two criminal cases including the one proceedings under Section 107 Cr.P.C. and it is also true that the prosecution has not brought on record the details of any further criminal case, but was not D.W.2 Baleshwar Prasad tendering in evidence a copy of the First Information Report which was lodged by acquitted accused Sri Ram Dubey against persons including P.W.2 Kedar Singh. The evidence of Kedar Singh in paragraph-3 indicates that the family constituted by himself and the deceased Ramautar Yadav was still joint on the day he was deposing in court. He might have stated that he did not have any enmity with the accused persons but that document (Ext.C) tells a different story that there was a criminal case other than the proceedings under Section 107 Cr.P.C. between one of the accused and the witnesses, like, P.Ws. 2 and others. The evidence might have come from the prosecution or the defence in support of either the charge or the plea




which had been raised by the accused persons in their defence, but for a court of justice, the evidence of both sides is the evidence in a case and that has to be considered in its entirety for raising some inference. Therefore, even if P.W.5 or for that matter the prosecution brought on record any document or evidence in spite of they having denied the existence of any further case between them, we may on the basis of Ext.C note down that there was some enmity between the parties.

At this stage, Sri Pandey, the learned Senior counsel appearing on behalf of the appellants rose to submit that might be that there had been some instances of individual enmity between one accused or the witnesses, but appellant Devendra Dubey does not appear to have any particular motive on that account to pick up the gun to kill the deceased. What we find from the array of accused persons and the array of witnesses who appeared in the case is that there was a cleavage probably in village Khaira Dubey on some caste lines and what further appears is that no wonder that would have been one of the motivating factors for appellant Devendra Dubey to act in the manner as was alleged by the prosecution. On a conspectus of the evidence which is available to us on record, we do not find it a case in which we could hold with substantial reasons at our command that the prosecution had not succeeded in establishing




the motive for which the offence was committed.

16. Having considered the submissions of the learned Senior counsel appearing on behalf of the appellants on the merits of the allegation so as to bringing the case under Section 149 of the Indian Penal Code, we find that there is no evidence indeed coming from any of the witnesses that after having arrived at the scene of occurrence, any of the appellants had even uttered a word so as to prosecuting the object which was fixed by the unlawful assembly. In fact the evidence on record does not indicate that there was an assembly which was firstly having some common object and that the 11 accused persons named in the First Information Report had reached the place of occurrence to prosecute that particular object of the assembly. Three out of the 11 accused were armed with *bhala*, one was carrying a *farsa* and remaining seven were armed either with a gun or a country made pistol as appears the case with appellant Ram Niwas Dubey. None of them except Devendra Dubey appears having raised their arms to bring it in a position of wielding it to fire a shot. We have already noted while discussing the general nature of the evidence that there was not even an exchange of words between the deceased or the witnesses on the one side and the accused persons on the other especially appellant Devendra Dubey and he fired the fatal shot. Appearing merely with




arms may not be the deciding factor that any member of the mob was having the knowledge as to what was the common object which had been fixed by the assembly and after knowing that object he had voluntarily accompanied the other accused persons also with a motto of prosecuting that particular assembly. How the court should apply the provisions of Section 149 of the Indian Penal Code in cases of silent appearance of accused persons at the scene of occurrence had remained the subject matter of judicial consideration and the issue was again raised in *Ranbir Yadav v. State of Bihar*, reported in *AIR 1995 SC 1219* and the issue was considered by the Apex Court at quite some length as may appear from the perusal of the decision right from paragraph 44 to 46 of the judgment. Decisions which were laying down that some sort of acts should be attributed so as to indicating that the person who was one of the members of the assembly, indeed knew as to what common object had been fixed by the assembly and then had they moved on to the place of occurrence as one of the participants in the commission of such a criminal act. The submission in *Ranbir Yadav* (supra) was dismissed taking into account the circumstances under which the massacre was committed of innocent persons who were fleeing for their lives and even jumping into the river Ganges, but they were chased, shot and killed. Ranbir Yadav the appellant before the Apex Court who had raised



the plea was riding a horse, being armed with a gun and was commanding his companion members of the mob to erase the very hamlet by massacring the whole population. Not less than 13 persons had been killed, many on account of jumping into the river and the hamlet was erased as regards its existence. These were the circumstances under which the Apex Court was considering the participation of Ranbir Yadav and rejecting the submission. But, here in the case in hand, we do not have any such serious circumstances which were noticed by the Supreme Court in *Ranbir Yadav* (supra) rather we have very innocuous factual data which does not raise any inference that the accused persons other than Devendra Dubey had merely appeared at the scene of occurrence. They did not raise their arms. They did not raise their hands. They did not even speak a word least to talk of aiming at any one of them on the prosecution side to meet out the goal that had been fixed by the assembly. The very decision in *Ranbir Yadav* (supra) had noticed one of the common features which appear generally in implicating innocent persons. The Apex Court was referring to *Bajwa v. State of U.P.*, reported in (1973) 3 SCR 571 = AIR1973 SC1204 and was extracting the relevant part of the judgment in *Bajwa* (supra) which runs as follows:-

*"The evidence through which we have been taken by the learned counsel at the bar has been examined by us with care and anxiety because in cases like the present*



*where there are party factions, as often observed in authoritative decisions there is a tendency to include the innocent with the guilty and it is extremely difficult for the Court to guard against such a danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the Court. (see Kashmira Singh v. State of M.P., 1952 SCR 526 = (AIR 1952 SC 159) and Bhuboni Sahu v. The King, 76 Ind App 147 = (AIR 1949 PC 257). In the case in hand, no doubt, the prosecution witnesses claiming to have seen the occurrence have named all the appellants and the approver has even named those acquitted by the High Court. But in our view it would be safe only to convict those who are stated to have taken active part and about whose identity there can be no reasonable doubt".*

17. This appears to us also a case in which innocent persons were implicated falsely probably out of the simmering enmity which ultimately boiled into the commission of the murder of Ramautar Yadav. This is more prominently indicated by the fact that in spite of having named 11 persons in the First Information Report and leaving no further room to implicate anyone as appears from the statement made in the First Information Report, two more persons Hirdeya Dubey and Sri Ram Dubey were implicated as appears admitted by none else than the informant himself in his deposition when he stated that Shiv Bachan Singh who was also the *Mukhiya* of the Panchayat had put those names into his mouth while he was making his further statement before the police after registration of the case. This evidence of P.W.5 makes it more eminently dangerous for us that in absence of any particular overt

act or circumstances as have been noticed by the court, we should uphold the conviction of appellants other than Devendra Dubey. We are inclined to hold that appellants of Cr. Appeal (DB) No. 351 of 1991 and Cr. Appeal (DB) No. 360 of 1991 were entitled to benefit of doubt and accordingly, we acquit them on that basis by allowing the two appeals. The five surviving appellants of the above noted two appeals are acquitted of the charges they had been found guilty of. They are on bail. They shall stand discharged from the liabilities of their respective bonds.

18. So far as the appellant of Cr. Appeal (DB) No. 375 of 1991 is concerned, considering the evidence which appears directly against him and which was unadulterated and unblemished, we uphold his conviction and dismiss the appeal. Appellant Devendra Dubey is on bail. He should surrender to his bond before the court below to serve out the sentence.

**(Dharnidhar Jha, J.)**

**(Amaresh Kumar Lal, J.)**

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